IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

ALGIE ROE ROBERSON, EVERETTE LEE HOLLINS,
CHARLES RICHARD GRIFFITH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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In The
Supreme Court of The United States

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ALGIE ROE ROBERSON, EVERETTE LEE HOLLINS,
CHARLES RICHARD GRIFFITH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Algie Roe Roberson, Everette Lee Hollins, and Charles Richard Griffith pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on July 20, 1960.

OPINION BELOW.

The District Court did not render a written opinion. The memorandum opinion of the Court of Appeals for the Sixth Circuit is annexed hereto as an appendix on page A1.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 20, 1960 (pp. A11, A12 *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED.

(1) Was it error for the District Court to deny the motion of defense counsel, made at the beginning of the trial, that copies of all written statements and verbal summaries made by witnesses who were to testify for the government be furnished defense counsel so they might be used effectively in cross-examination?

(2) Was it error for the District Court to permit government counsel to comment, in the presence of the jury, and for the District Court itself to comment, that a government witness' statement was being turned over to defense counsel?

(3) Was it error for the District Court to permit government witnesses, when testifying, to read their testimony from written and prepared statements?

(4) Was it error for the District Court, itself, and for government counsel to require the defendants to stand up when their names were mentioned by a witness in order to

be identified by the testifying witness; and was it error for government counsel to call upon petitioner Hollins to state his name for identification purposes?

(5) Was it error for the District Court to permit government witnesses to testify about matters obtained through illegal and unconstitutional searches of vehicles?

(6) Was it error for the District Court to permit government witness John L. West to testify in the case when the rule had been demanded, and he had been present in the courtroom throughout all the previous government testimony?

(7) Did the District Court err in permitting testimony by government witnesses concerning statements made by defendant Smith after his arrest?

(8) Was it error for the District Court to permit the introduction of a book taken from the person of defendant Smith when he was arrested; and in permitting the introduction from said book of the statement: "Ga Boy 5-3004"?

(9) Was it error for the District Court to permit witnesses to testify that when defendant Nichols was arrested he made the statement that he had been delivering whiskey from 1022 Pine Street for about three months for 50¢ a gallon?

(10) Was it error for the District Court to refuse a motion for mistrial when it was brought to the attention of the jury by government counsel, in questioning the witness A. R. Roberson, Jr., that petitioner Roberson had been convicted previously?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendement to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, and to have the assistance of counsel for his defense."

STATEMENT.

Petitioners were jointly indicted at the March 1959 term of the Grand Jury meeting in the Northeastern Division of the Eastern District of Tennessee at Greeneville, Tennessee, in a one-count indictment charging a violation of 18 U. S. C., Section 371, in that they allegedly conspired to violate Sections 5008(b), 5174, 5216, 5606, 5632, 5642, 5681, 5686, 5691, and 7206(4), Internal Revenue Code. (R. 7a-15a). All of the sections of the Internal Revenue Code allegedly violated pertain to distilled spirits upon which the tax was not paid and to the distilling of spirits without complying with the provisions of the Internal Revenue Code.

After the indictment was returned, the case was transferred to the Southern Division of the Eastern District of Tennessee, at Chattanooga.

Petitioner Roberson received a five-year sentence; petitioner Hollins received a three-year sentence; and petitioner Griffith received a three-year sentence. None of petitioners was given a preliminary hearing before indictment.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred in holding:

(1) It was not error for the District Court to deny the motion of defense counsel, made at the beginning of the trial, that copies of all written statements and verbal

summaries made by witnesses who were to testify for the government be furnished defense counsel so they might be used effectively in cross-examination;

(2) It was not error for the District Court to permit government counsel to comment, in the presence of the jury, and for the District Court itself to comment that a government witness' statement was being turned over to defense counsel;

(3) It was not error for the District Court to permit government witnesses, when testifying, to read their testimony from written and prepared statements;

(4) It was not error for the District Court, itself, and for government counsel to require the defendants to stand up when their names were mentioned by a witness in order to be identified by the testifying witness; and it was not error for government counsel to call upon petitioner Hollins to state his name for identification purposes;

(5) It was not error for the District Court to permit government witnesses to testify about matters obtained through illegal and unconstitutional searches of vehicles;

(6) It was not error for the District Court to permit government witness John L. West to testify in the case when the rule had been demanded, and he had been present in the courtroom throughout all the previous government testimony;

(7) It was not error for the District Court to permit testimony by government witnesses concerning statements made by defendant Smith after his arrest;

(8) It was not error for the District Court to permit the introduction of a book taken from the person of defendant Smith when he was arrested; and in permitting the introduction from said book of the statement: "Ga Boy 5-3004";

(9) It was not error for the District Court to permit witnesses to testify that when defendant Nichols was arrested he made the statement that he had been delivering whiskey from 1022 Pine Street for about three months for 50¢ a gallon;

(10) It was not error for the District Court to refuse a motion for mistrial when it was brought to the attention of the jury by government counsel, in questioning the witness A. R. Roberson, Jr., that petitioner Roberson had been convicted previously.

REASONS FOR GRANTING WRIT.

The questions presented here are substantial ones, and are of great and widespread importance. A conspiracy case is a difficult one to defend in that all manner of irrelevant and immaterial testimony enters the case if the government avers that the evidence will be later made relevant or material. This occurred in the instant case. The record is replete with evidence of wholly innocuous associations between petitioners. A conspiracy indictment has been termed "a prosecutor's darling" for this very reason.

(1) The District Court and the Court of Appeals for the Sixth Circuit nullified the effect of the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, 77

S. Ct. 1007, by denying defense counsel's motion to have the statements of government witnesses prior to their testifying, thus giving defense counsel no opportunity to prepare for cross-examination. No recess was taken to permit defense counsel to examine the statements.

(2) The District Court permitted the government counsel to comment in the presence of the jury, and the District Court itself commented that a government witness' statement was being turned over to defense counsel, thus fortifying and lending emphasis to the testimony of the witness then on the witness stand.

(3) Witnesses were permitted to read their typewritten and prepared statements to the jury, thus making it a trial by affidavit and written memoranda, rather than evidence; and in effect, violating petitioners' rights under the Fifth Amendment to the Constitution which provides, in part:

> "• • • nor shall any person • • • be deprived of life, liberty or property, without due process of law, • • •"

and of the Sixth Amendment to the Constitution, which provides, in part:

> "In all criminal prosecutions, the accused, • • • shall • • • be confronted with the witnesses against him."

(4) Petitioners Roberson and Hollins did not testify in the trial. But, while the government was putting on its case the District Court required the defendants to stand up when their names were mentioned by a witness then testifying in order to be identified; and petitioner

Hollins was required to state his name in order to be identified. This violated petitioners' rights under the Fifth Amendment to the Constitution, in that petitioners were required to give testimony against themselves.

(5) Government witnesses were permitted to testify concerning what they saw and smelled in a vehicle belonging to petitioner Roberson while the vehicle was in a garage being serviced. They made this search without a warrant, and without probable cause. This violated petitioner Roberson's rights under the Fourth Amendment to the Constitution, and affected all the petitioners for the reason that any evidence against one petitioner was evidence against all, since it was a conspiracy case.

(6) At the beginning of the trial, the rule was demanded excluding all witnesses who were to testify. The government witness, John L. West, was permitted to remain in the courtroom throughout all the government's testimony and he was then put on the stand as the government's last witness. Objection was made to his testifying, but the District Court allowed him to testify. The District Court has broad discretion in such matters, but in the instant case such tactics of the government deprived these petitioners of a fair and impartial trial and of due process of law. The government put this witness in a position to tie up all loose ends of the government's case, and he did so.

(7) After defendant Smith was arrested, he was questioned by government officers and these officers were permitted to testify, over objection, as to admissions made by Smith. This evidence was never excluded from the

record. None of the testimony was in furtherance of an alleged conspiracy, and certainly occurred after any alleged conspiracy had terminated. It is too fundamental to require citation that this evidence was inadmissible, and was highly prejudicial to all petitioners.

(8) After the arrest of defendant Smith, a book was taken from his person and a portion of the book was introduced in the evidence, which was a notation therein: "Ga Boy 5-3004." Petitioner Roberson was known by a nickname of "Georgia Boy"; but this evidence was inadmissible because it was not in furtherance of an alleged conspiracy and was taken from Smith after any alleged conspiracy had terminated.

(9) Defendant Nichols was arrested by government officers, and the District Court permitted these officers to testify that Nichols stated he had been delivering whiskey from 1022 Pine Sreet, Chattanooga, for about three months for 50¢ a gallon. This evidence was inadmissible insofar as these petitioners were concerned for the reason that the statement was not made in furtherance of any alleged conspiracy and was made after the termination of any alleged conspiracy.

(10) During the cross-examination of defense witness, A. R. Roberson, Jr., government counsel asked the witness questions which were calculated to and did let the jury know that petitioner Roberson had been convicted previously for a violation involving "moonshine" whiskey. Since petitioner Roberson did not take the stand in his own defense, no evidence concerning a previous conviction was admissible, and government counsel knew

this. The motion for mistrial should have been granted. The government's action was highly prejudicial to petitioner Roberson, and since this was a conspiracy case, it was highly prejudicial to the other petitioners.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX.

Opinion of United States Court of Appeals for the Sixth Circuit.

(Filed July 20, 1960)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13984, 13985, 13986

No. 13984
Algie Roe Roberson, Appellant,
vs.
United States of America, Appellee.

No. 13985
Everette Lee Hollins, Appellant,
vs.
United States of America, Appellee.

No. 13986
Charles Richard Griffith, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided July 20, 1960.

Before Cecil and O'Sullivan,* Circuit Judges, and Boyd, District Judge.

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*At the time this case was heard, Judge O'Sullivan was a District Judge, sitting by designation. He became a Circuit Judge on April 4, 1960.

O'Sullivan, Circuit Judge. This opinion considers the appeals of Algie Roe Roberson, No. 13984; Everett Lee Hollins, No. 13985, and Charles Richard Griffith, No. 13986, from judgment entered upon a jury's verdict convicting them, and others, of conspiracy (Title 18, U. S. C., 371) to violate sections of the Internal Revenue Code of 1954 relating to the manufacture, sale, possession, transportation and distribution of untax-paid whiskey.

Seven persons besides appellants were named with them in an indictment, and all were found guilty of the offenses charged. Twenty-three overt acts in the execution and carrying out of the conspiracy were set forth in the indictment. They occurred between August 12 and November 24, 1958.

Appellants were sentenced to prison, as follows: Roberson for five years, Hollins for three years, and Griffith for three years.

The evidence disclosed that between the dates mentioned a large operation in the manufacture and sale of moonshine whiskey was carried on at and near the city of Chattanooga, Tennessee. The whiskey was manufactured in the Suck Creek Mountain region outside of Chattanooga. It was transported to premises known as 1022 Pine Street, in Chattanooga, from which point it was distributed to customers of the enterprise. While quite a few persons contributed to the commercial success of the business, (the volume of sales from the distribution point amounted to as high as 150 gallons per day) a fair review of the evidence discloses that the principal actors were the three

appellants. Hollins' contribution to the enterprise consisted, principally, of being tenant of the Chattanooga headquarters on Pine Street, and director of the distribution made from there. He owned several vehicles used for deliveries. Appellants Roberson and Griffith were in charge of transportation of the whiskey from its place of manufacture in Suck Creek Mountain to the distribution point.

The Government's evidence was provided mainly by testimony given by Government agents who had this operation under surveillance over the period of time covered by the indictment.

Appellants assert ten grounds for reversal of the judgment of conviction. We find reversible error in none of them, and discuss them briefly as follows:

(1) Motion for direction of acquittal:

There was competent proof that illegal whiskey was manufactured as charged in the indictment, that it was transported to the place of distribution, and from there distributed to the trade. Various activities of the three appellants were described in considerable detail by the investigating officers. Not each of the described activities, standing alone, presented evidence of criminal conduct. However, all three appellants were seen at various times engaged in the handling or distribution of illegal whiskey. There was ample proof of an integrated operation. The officers conceded that some of the activities described were not, in themselves, illegal, but such evidence was relevant and circumstantially corroborative of the continued progress of the enterprise in which appellants were principal

actors. The motion for a directed acquittal was properly denied.

(2) Claimed violation of Jencks rule:

At the beginning of the trial, defense counsel requested to be given copies of all written statements and verbal summaries theretofore made by witnesses who were to testify for the Government. This was refused. However, at the conclusion of the direct testimony of each government witness, defense counsel was provided with a copy of whatever statement had been made by such witness, and opportunity was allowed for counsel to study the same for use upon cross-examination. We find nothing in *Jencks* v. *United States*, 353 U. S. 657, requiring that all of such statements be given to defense counsel at the beginning of the trial; or that a statement of an individual witness be given prior to conclusion of such witness' direct testimony. Section 3500, U. S. C., Title 18, adopted as a consequence of the *Jencks* decision, provides, in subsection (a):

> "In any criminal prosecution * * * no statement or report * * * made by a Government witness or prospective Government witness * * * shall be subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.*"

(3) Emphasis on delivery of statements to defense:

As the statement of each witness was delivered to defense counsel, the fact that it was being so delivered was stated either by the Court or the District Attorney in the presence of the jury. It is complained that such conduct unduly emphasized these statements and was prejudicial.

We find no merit in this. No objection to, or criticism of, the conduct of the Court or District Attorney in this regard was made. It was within the discretion of the District Judge to conduct the trial in such manner.

(4) Use of notes by Government witnesses while on the stand:

Some Government witnesses had with them on the witness stand memoranda containing notes made during the course of the investigation. It was appropriate for the witnesses to refresh their recollection from such notes. A fair review of the record does not justify appellants' claims that these witnesses' testimony amounted to a reading of prepared statements. Their examination on direct and cross-examination proceeded in the traditional manner of question and answer. The Court admonished the witnesses, when objection was made, that they were merely to refresh their recollection from the notes.

(5) Requiring defendants to stand for identification:

During the examination of several Government witnesses, when reference was made to one or more of the defendants, the defendant concerning whom testimony was being given was asked to stand. The witness then identified the defendant standing as the person being talked about. No objection was made to this procedure. No request was made to have it discontinued. On one occasion, defense counsel himself asked that the defendant Hollins stand so he might be identified by a witness. We find no error in what occurred. *Holt* v. *United States*, 218 U. S. 245, 252.

(6) Admission of claimed irrelevant testimony:

Government witnesses conceded that some of defendants' activities described by them were not, in and of themselves, proof of the offenses charged. We find, however, that the evidence complained of was material and relevant to a showing of the general plan and method of the entire criminal enterprise.

(7) Claimed illegal search of motor vehicle:

Government witnesses testified as to their observation of what was in a vehicle owned by one of the defendants when it was in a public garage, and also that they detected the odor of whiskey while in the vicinity of the vehicle. No search of, or entering into, the vehicle was made. No objection was made to this testimony, nor do we find that there was an illegal search of the vehicle involved.

(8) Allowing Government witness to remain in the courtroom notwithstanding exclusion rule:

The Government's witness John L. West was a Government agent in charge of the investigation. Other witnesses were excluded from the courtroom, but he was allowed to remain at the counsel table. When he was offered as a witness, objection was made to his being permitted to testify. This was a matter within the discretion of the trial judge. *Powell* v. *United States*, 208 F. 2d 618 (C. C. A. 6)

(9) Admission of co-conspirator:

One of appellants' co-defendants, Clairried Eugene Smith, was arrested at the premises at 1022 Pine Street

on August 26, 1958. After his arrest, he told the arresting officers that he had been delivering whiskey for the appellant Hollins for some three or four years. Objection was made to that testimony in the following manner:

> "Mr. Badgett: Now, your Honor, the jury should be instructed on that. I request that anything he might have said certainly would not be admissible."

The above was followed by instruction and colloquy, as follows:

> "The Court: Yes. Anything Smith may have said will only bear on Smith's case, unless a conspiracy is established, and it is shown that Smith along with others were part of that conspiracy. If the statements were made in pursuance of the conspiracy and if the conspiracy is established, then the statement may have a bearing on those who were in the conspiracy, if any. But at this time the statement will only be considered with respect to Smith's case unless the jury finds a conspiracy was established and others were in it.
>
> "Mr. Badgett: May I respectfully suggest, your Honor, that the statement also would have to be in furtherance of the conspiracy before it would be admissible?
>
> "The Court: That's right. That's what I told you. Yes, it would have to be in furtherance of the conspiracy before it would be binding on the alleged conspirators. And, remember, before there can be a conspiracy there must be two or more parties to that conspiracy. One person cannot conspire with himself. All right.
>
> "Mr. Dugger: All right."

There may be some question as to whether, nothwithstanding the establishment of a conspiracy, the admission

of Smith following his arrest could be considered as in furtherance of it. We, however, are satisfied that if there was any error in this regard, it was harmless error within the contemplation of Rule 52(a) of the Federal Rules of Criminal Procedure. The evidence of appellants' guilt of the offenses charged was clear, abundant and strong, and under such circumstances, if the admission of this testimony was error, we would consider it harmless. *Banning* v. *United States*, 130 F. 2d 330, 339; *Green* v. *United States*, 19 F. 2d 850; *United States* v. *Sheba Bracelets, Inc.*, 248 F. 2d 134; *Thompson* v. *United States*, 258 F. 196; *Glasser* v. *United States*, 315 U. S. 60, 83; *United States* v. *Borden Co.*, 347 U. S. 514, 516.

(10) Admission of address book taken from defendant Smith:

At the time of the arrest of defendant Smith, referred to in question nine above, there was taken from him an address book which contained a notation: "GA Boy 5-3004." The appellant Roberson was known as "Georgia Boy" and his telephone number was 5-3004. During the course of the colloquy relating to the admissibility of this exhibit defense counsel said:

> "We have no objection, your Honor. I want the jury to see this."

Counsel added:

> "Other than the objection I have stated, unless it is tied up, it isn't admissible."

The relevancy of the book was established and it was tied up with defendant Roberson. We find no error in what occurred.

(11) Admission of co-defendant after arrest:

Another one of the co-defendants, after arrest made a statement similar to that of co-defendant Smith, to the effect that he had been delivering whiskey from 1022 Pine Street for about three months prior to his arrest. No objection was made to this testimony and we find no error in this regard.

(12) Denial of mis-trial:

Algie R. Roberson, Jr., son of appellant Roberson, was called as a defense witness. He gave testimony as to his father's activities during the time that it was claimed he was engaged in the illegal enterprise for which he was indicted. He had been testifying that his father was in the garage business. The District Attorney asked him whether it wasn't a fact that he was engaged in the moonshine business. The witness said not that he knew of. He was then asked by Government counsel whether or not he had been "down here to the courtroom before." He answered that he had been "down here to the court." Objection was then made that this examination was part of an attempt to prove that defendant Roberson had been convicted. After defense counsel had objected to the inquiry about Roberson's son having been at court, Government counsel stated he would withdraw the question and would ask the jury to disregard it. The jury was excused, a motion for mistrial was made, and it was denied. Upon the jury returning to the courtroom, the trial judge reviewed the cross-examination in question and, referring to the District Attorney's question, stated:

"The question is incompetent for any purpose, just don't consider it."

We think the Court's instruction was sufficient to eradicate any prejudice that may have taken place. In any event, we consider the whole matter harmless error within Rule 52(a) of the Federal Rules of Criminal Procedure. *Morissette* v. *United States*, 187 F. 2d 427; 431.

The judgments of conviction are affirmed.

JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed July 20, 1960)

No. 13,984. APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby affirmed.

No. 13,985. APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby affirmed.

No. 13,986. APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby affirmed.

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JAMES R. BROWNING, Clerk

No. 347

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALGIE ROE ROBERSON, EVERETTE LEE HOLLINS, AND CHARLES RICHARD GRIFFITH, PETITIONERS

v.

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 347

ALGIE ROE ROBERSON, EVERETTE LEE HOLLINS, AND CHARLES RICHARD GRIFFITH, PETITIONERS

v.

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on July 20, 1960 (Pet. App. 11-12). The petition for a writ of certiorari was filed on August 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the conviction of the petitioners for conspiracy to violate the liquor laws should be reversed because of alleged errors occurring during their trial.

STATUTE INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

STATEMENT

The petitioners, Roberson, Hollins and Griffith, and a number of other defendants were charged in a one-count indictment in the United States District Court for the Eastern District of Tennessee with conspiracy to violate various internal revenue statutes relating to the possession, control, and taxes upon spirituous liquors (R. 7-15). The jury found all three of the petitioners guilty (R. 3). The court sentenced Mr. Roberson to imprisonment for five years, and Messrs. Hollins and Griffith to three-year terms (R. 30-34). On appeal (R. 38-43) the convictions were affirmed (Pet. App. 1-12).

Since the petitioners do not challenge the sufficiency of the evidence in this Court, we set out only a sum-

mary of such evidence as relates to the points which they raise in their petition.

1. At the start of the trial Mr. Badgett, counsel for Mr. Roberson and Mr. Griffith, requested that the defense be given copies of all written statements of government witnesses, but the court overruled the motion, noting that counsel would not be entitled to such a statement until after a witness had testified (R. 51-52).

During the direct testimony of the witness Orr, this colloquy occurred (R. 100-101):

> MR. DUGGER: If the Court please, I would like the record to show that I gave Mr. Badgett a copy of the signed statement furnished by this witness.
>
> THE COURT: That's good, Mr. Dugger. And, if you can, any other witnesses, where it isn't prejudicing either side in any way, without prejudice to any part[y], either of the defendants or the government, any cooperation that can be afforded by the parties, that will accelerate the trial, without prejudice to anybody, that will be welcomed by the Court and I am sure by the jury and everybody concerned.
>
> MR. BADGETT: I got it just now, your Honor. It will take some time to read it.
>
> THE COURT: All right.

Defense counsel was given time to read Mr. Orr's statement before proceeding with cross-examination (R. 109, 144).

On the cross-examination of another government witness, Mr. Andrews, the following occurred (R. 168-169):

MR. BADGETT: Now, Your Honor, if the government has a statement from this witness, I would like to see it, either a written or a verbal summary.

THE COURT: All right, sir.

MR. DUGGER: Let the record show that a copy of the statement was given to Mr. Badgett.

MR. BADGETT: Yes. Let the record show, too, it was at the time I started to cross-examine him.

MR. DUGGER: If the Court please, I object to that statement. Mr. Badgett knows that under the law that's when he is entitled to receive the statement, and I object to him making such a statement as that before the jury.

THE COURT: Now, ladies and gentlemen of the jury, under the recent act governing these statements, counsel was entitled to the statement which was given by this boy to the government, and this act was passed in response to what was known as the Jencks decision, and it provides in substance, when a witness goes on the witness stand and testifies to certain statements, that he has given a statement to the government that contains those same statements, then the accused party on trial or his counsel may have it, may have such statement, for the purpose as it is desired.

Now, gentlemen, there is no use to get in an argument over matters of this kind. The law has been explained to you about that.

The court allowed defense counsel to reserve cross-examination for over-night study of another witness' statement (R. 231), and permitted counsel additional time to read over other statements of still

other government witnesses before proceeding with their cross-examination (R. 302, 322-323).

2. During the direct examination of a government agent, Mr. Orr, the following occurred (R. 53-54):

> MR. BADGETT: Your Honor, I want to object to reading the statement. He has got the statement in front of him and he is starting to read from it. That isn't fair to this jury or anybody.
>
> MR. DUGGER: If the Court please, I would like to state that this witness made observations on various dates from August up until January of this year, and under the law he has a right to refer to the notes he makes at the time in order to refresh his recollection of what happened on a particular date and a particular time.
>
> THE COURT: Yes. Mr. Witness, you may refer to your notes to refresh your recollection. Just refresh your recollection from the notes. You may be seated.
>
> MR. BADGETT: My point is this, your Honor. I agree that he has got the right to read that and refresh his recollection, but then to hold it open there and read from it to the jury isn't evidence. It doesn't rate the dignity of evidence.
>
> THE COURT: You may look at it but just use it for the purpose of refreshing your recollection.

Later during the direct examination of the same witness, a similar defense objection was made, to which the court responded (R. 64):

> He has a right, Mr. Badgett, to look at the statement and refresh his recollection. Now, I hope you don't read the statement Mr. Orr, but you have a right to have it before you and use

it to refresh your recollection. I overrule the objection to that extent. Go ahead.

3. Petitioners Roberson and Hollins did not testify, but petitioner Griffith did (R. 383). Several times during the trial, the prosecutor asked Mr. Roberson (R. 62, 167) and Mr. Hollins (R. 81, 151) to stand to be identified by government witnesses, and no objection was made to this procedure. In one instance, when Mr. Hollins' counsel was cross-examining a government witness, he told Mr. Hollins to stand up for identification (R. 110-111).

4. Petitioner Roberson's automobile had been used to bring the whiskey from the still to the distribution point in Chattanooga (R. 75-76, 248, 251-252, 253). Mr. Orr testified without objection that on September 10, 1958, when this car was in a garage having the wheels aligned, he noticed that it "bore the strong odor of moonshine whiskey and also a sweet smelling perfume" (R. 78, 79). Another government agent, Mr. West, testified without objection that on October 16, 1958, when this car with the right window down was parked in the new car department of an automobile company, he could smell a strong odor of moonshine whiskey (R. 308, 311-312).

5. At the start of the trial, defense counsel requested the rule excluding witnesses from the courtroom. The government asked that it be permitted to keep Mr. West as its representative, and the court approved (R. 50). When Mr. West, who had participated in the surveillance of the petitioners' activities, started his testimony as the last government witness, this colloquy ensued (R. 306-307):

MR. BADGETT: Your Honor, we want to object to this witness giving any testimony. The rule was requested and he has been in this court room every minute of this trial. And, if they intended to use him, I think they should have used him before he heard any of the testimony. Under the rule he was only asked to be in here as a government representative, and it wasn't stated he was to be a witness, so the rule should apply to him. And we object to his testimony.

MR. DUGGER: If the Court please, that has been the practice in this district ever since I have been in the district and before that. The government is entitled to have a representative to sit at the counsel table to aid the United States attorney, as was the practice when Mr. Badgett was in the United States attorney's office. Mr. Badgett knows that is the practice. I don't know why he is objecting unless he wants to call attention to the jury. But I think this witness is entitled to testify.

THE COURT: The objection is overruled.

6. Mr. Orr testified that on August 26, 1958, government agents went with a search warrant to the premises at 1022 Pine street and seized two five-gallon cans of moonshine whisky, a filter system, and some empty jugs and cans. Defendant Smith was arrested (R. 69-70). When the agent was asked whether Mr. Smith made any statement, the following colloquy occurred (R. 70-72).

MR. BADGETT: Now, your Honor, the jury should be instructed on that. I request that anything he might have said certainly would not be admissible.

THE COURT: Yes. Anything Smith may have said will only bear on Smith's case, unless a

conspiracy is established, and it is shown that Smith along with others were part of that conspiracy. If the statements were made in pursuance of the conspiracy and if the conspiracy is established, then the statement may have a bearing on those who were in the conspiracy, if any. But at this time the statement will only be considered with respect to Smith's case unless the jury finds that a conspiracy was established and others were in it.

MR. BADGETT: May I respectfully suggest, your Honor, that the statement also would have to be in furtherance of the conspiracy before it would be admissible?

THE COURT: That's right. That's what I told you. Yes, it would have to be in furtherance of the conspiracy before it would be binding on the alleged conspirators. And, remember, before there can be a conspiracy there must be two or more parties to that conspiracy. One person cannot conspire with himself. All right.

The agent then testified that Mr. Smith said that he had been working for Mr. Hollins for three or four years, that he received 50 cents a gallon for delivering the whiskey, that he had used the 1949 Mercury coach owned by Mr. Hollins to deliver the whiskey (R. 71-72). A second agent gave testimony, admitted without objection, substantially corroborating Mr. Orr's testimony about what Mr. Smith had said at the time of his arrest (R. 194-195).

Another witness testified that on December 11, 1958, he assisted in the arrest of defendant Nichols, who admitted that "he had been delivering whiskey from 1022 Pine Street for about three months for 50

cents a gallon" (R. 230). There was no defense objection to this testimony.

7. A government witness started to testify about an address book taken from defendant Smith at the time of his arrest. The attorney for petitioners Roberson and Griffith objected that this would not be admissible against his clients. The court ruled: "Well, no, it wouldn't. Anything that he said would not be binding on any of the other parties in the lawsuit unless the jury finds that there was a conspiracy and if the jury further finds the statement allegedly made by him was in furtherance of the conspiracy" (R. 195-196). The witness testified that in the address book he found a notation "Ga Boy and alongside that the number 5-3004." (R. 196).[1] When the government offered the book in evidence, the following occurred (R. 197):

> MR. BADGETT: We have no objection, your Honor. I want the jury to see this.
>
> THE COURT: All right.
>
> MR. BADGETT: Other than the objection I have stated, unless it is tied up, it isn't admissible.
>
> THE COURT: Yes. Hasn't the Court explained that?
>
> MR. BADGETT: I think so.

8. Petitioner Roberson's son testified as a defense witness that his father was engaged in business as a garage mechanic and had done work on cars for

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[1] Petitioner Roberson was known by the nickname of "Georgia Boy" (R. 161, 354). Mr. Roberson's telephone number was Amherst 5-3004 (R. 154).

Messrs. Griffith and Hollins (R. 372-374). On cross-examination this colloquy occurred (R. 378):

> Q. And he [petitioner Roberson] has been in the moonshine business, too, hasn't he?
> A. I don't know—not that I know.
>
> * * * *
>
> Q. Not that you know of?
> A. No.
> Q. Haven't you been down here to the court room before?
> A. Yes, sir, I have been down here to the court.

Defense counsel then moved that this evidence be stricken, refused the government attorney's offer to withdraw the question, and asked for a mistrial on the ground that an improper reference had been made to a previous conviction (R. 378-379). After overruling the motion and recalling the jury, the court instructed as follows (R. 379-380):

> Ladies and gentlemen of the jury, Mr. Dugger, the assistant district attorney, asked Mr. Roberson, who is now on the witness stand, in substance if he didn't know that Mr. Roberson, senior, had been in the moonshine whiskey business, and Mr. Roberson, now on the witness stand, said no.
>
> That question is incompetent for any purpose. Just don't consider it.
>
> Mr. Dugger asked Mr. Roberson, Jr. again if he hadn't been down here in court and heard something, or in substance that. That question is not competent for any purpose and don't consider it. Don't consider it.
>
> * * * *

ARGUMENT

1. There is no merit in the petitioners' contention (Pet. 7-8) that the court erred in refusing to give defense counsel copies of statements by the government witnesses before their direct examination. The procedure followed by the court was in compliance with the Jencks Act, 18 U.S.C. 3500, under which a statement is not producible for inspection until after the "witness has testified on direct examination." The court allowed defense counsel extra time to study the statements where counsel deemed this necessary for purposes of cross-examination (R. 109, 144, 231, 302, 322-323).[2]

There was no impropriety in permitting the jury to know that the government had turned over statements of government witnesses to the defense. No objections on this ground were raised when the government attorney announced delivery of the statements (R. 100, 168). In view of the fact that defense counsel in the presence of the jury had made an unsuccessful motion for delivery of the statements by the witnesses at the start of the trial (R. 51), it was not unreasonable to allow the jury to know that the prosecution had delivered the statements later in compliance with the statute.

2. The record discloses no improper reading of statements by government witnesses and no trial by affidavit rather than evidence, as the petitioners claim

[2] In one instance defense counsel received the statement of witness Orr even before the conclusion of his direct examination (R. 100-101).

(Pet. 8). Presumably the instances referred to are those set out in the direct examination of Mr. Orr, a government witness, (*supra*, p. 5). On both occasions, defense objections were made as soon as the witness started to answer the question, thus indicating that he had merely looked at the statement to refresh his recollection. The court announced the correct rule that the witness could use the statement only for the purpose of refreshing his recollection, and the witness complied with this admonition.

3. There was no error in the procedure under which petitioners Roberson and Hollins stood up for identification by government witnesses (Pet. 8-9; Statement, *supra*, p. 6). Neither party was compelled to give testimony in violation of the Fifth Amendment, and no objection was made. While Mr. Hollins did testify as to his name in answering the prosecutor's question (R. 151), in another instance his own attorney asked him to stand for identification (R. 110-111). There was no error. See *Holt* v. *United States*, 218 U.S. 245, 252-253.

4. There was no illegal search of the car used to transport the whiskey (Pet. 9; Statement, *supra*, p. 6). There was nothing improper about the agents' presence at the garage and automobile company's premises, which were open to the public. The experienced agents were competent to testify that from their sense of smell they recognized the odor of moonshine whiskey. Cf. *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C.A. 2).

5. There was no error in permitting Mr. West to testify as as a government witness, even though he

had remained in the courtroom as a government representative from the start of the trial (Pet. 9; Statement, *supra*, pp. 6-7). The exclusion of witnesses is a matter resting in the sound discretion of the trial court. There was no abuse of that discretion in view of the rule that an officer in charge of a criminal case may be permitted to remain in the courtroom to advise government counsel, even though he himself testifies as a witness. Cf. *Powell* v. *United States*, 208 F. 2d 618, 619 (C.A. 6), certiorari denied, 347 U.S. 961; *Schoppel* v. *United States*, 270 F. 2d 413, 416-417 (C.A. 4).

6. The petitioners contend (Pet. 9-10) that the court erred in permitting testimony that, after his arrest, defendant Smith told Mr. Orr that he had been receiving 50 cents a gallon for delivering whiskey and that he had used petitioner Hollins' car for this purpose. It is said that this statement was not in furtherance of the conspiracy and occurred after the conspiracy had ended. At the time of Mr. Smith's statement on August 26, 1958, however, the conspiracy had not ended. There was evidence of overt acts, in which Mr. Smith himself and the petitioners engaged, occurring as late as November 21, 1958 (R. 14-15, 316-322). If the jury found that the statement was not made in furtherance of the conspiracy, under the court's instruction, they would not consider it binding upon the petitioners as co-conspirators. In any event, this was a minor bit of evidence relating only to Mr. Hollins. If there was error in admitting Mr. Smith's statement it was, as held by the court below, harmless (Pet. App. 8).

The statement by defendant Nichols after his arrest (Statement, *supra*, pp. 8-9), came in without objection. There was nothing in the attendant circumstances to lead the jury to believe that this statement could be used against any of the defendants other than Nichols himself.

7. There was no error in admitting evidence that defendant Smith at the time of his arrest had an address book with a notation referring to petitioner Roberson as "Georgia Boy" and giving his telephone number (Pet. 10; Statement, *supra*, p. 9). After government counsel stated that he wanted to introduce the book in evidence, defense counsel examined it and announced, "We have no objection, your Honor. I want the jury to see this" (R. 197). No challenge was made as to the validity of the arrest or the seizure of the address book. The evidence was relevant in tying in Mr. Smith and Mr. Roberson as conspirators in the enterprise, and defense counsel unequivocally approved of its admissibility. In this context the court did not err in admitting this evidence.

8. The court adequately corrected the indirect, if improper, reference, during the testimony of petitioner Roberson's son, to an alleged previous conviction of Mr. Roberson for a whiskey violation (Pet. 10-11). The court, in its contemporary instruction, explicitly directed the jury to disregard as incompetent the questions and answers relating to this matter. It must be assumed that the jury followed this clear admonition by the court. Cf. *Opper* v. *United*

States, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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